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June 8, 2000

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: **MM Docket No. 00-10**

Dear Ms. Salas:

On behalf of Davis Television Duluth, LLC; Davis Television Corpus Christi, LLC; Davis Television Pittsburg, LLC; Davis Television Topeka, LLC; Davis Televison Fairmont, LLC; and Davis Television Wausau, LLC, I am transmitting herewith an original and eleven copies of their Petition for Reconsideration in the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned counsel.

Very truly yours,

Ross G. Greenberg

Ross G. Greenberg

Enclosures

No. of Copies rec'd 0+9
List A B C D E

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Establishment of a Class A	)	MM Docket No. 00-10
Television Service	)	

To: The Commission

PETITION FOR RECONSIDERATION OF DAVIS TELEVISION DULUTH, LLC; DAVIS TELEVISION CORPUS CHRISTI, LLC; DAVIS TELEVISION PITTSBURG, LLC; DAVIS TELEVISION TOPEKA, LLC; DAVIS TELEVISION FAIRMONT, LLC; AND DAVIS TELEVISION WAUSAU, LLC

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June 8, 2000

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SUMMARY

Davis Television Duluth, LLC; Davis Television Corpus Christi, LLC; Davis Television Pittsburg, LLC; Davis Television Topeka, LLC; Davis Television Fairmont, LLC; and Davis Television Wausau, LLC (collectively, "Davis") strongly urge the Commission to reconsider its Report and Order in the Establishment of a Class A Television Service to ensure that Class A low-power television ("LPTV") applicants provide interference protection to all operating analog stations, unbuilt construction permits and applications. Although the Commission correctly found that Congress intended full-power NTSC applicants to be protected from Class A stations, Congress did not grant the Commission discretion to pick and choose among NTSC applicants, and the Commission should revise the Report and Order on reconsideration to extend protection to all NTSC applicants.

Additionally, Davis urges the Commission to recognize the Congressional mandate to not accept applications for Class A status until final regulations are adopted. The Commission's regulations will not be final until all reconsideration petitions are processed and acted upon. By acting promptly on all reconsideration petitions, the Commission can finalize its Class A regulations expeditiously while giving fair consideration to the merits of reconsideration petitions and avoiding unnecessary disruption to Class A service itself.

Finally, Davis believes that the FCC's interpretation of the CBPA violates the First Amendment of the United States Constitution, as there has been no showing in this record, either at the Congressional or agency level, that a preference for Class A stations over NTSC applications serves a compelling governmental interest and is the most narrowly tailored means to accomplish the identified objectives.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Establishment of a Class A	)	MM Docket No. 00-10
Television Service	)	

To: The Commission

PETITION FOR RECONSIDERATION OF
DAVIS TELEVISION DULUTH, LLC; DAVIS TELEVISION CORPUS CHRISTI, LLC;
DAVIS TELEVISION PITTSBURG, LLC; DAVIS TELEVISION TOPEKA, LLC;
DAVIS TELEVISION FAIRMONT, LLC; AND DAVIS TELEVISION WAUSAU, LLC

I. INTRODUCTION

Davis Television Duluth, LLC, applicant for a new NTSC construction permit on Channel 27 at Duluth, Minnesota ("Davis Duluth"); Davis Television Corpus Christi, LLC, applicant for a new NTSC construction permit on Channel 38 at Corpus Christi, Texas; Davis Television Pittsburg, LLC, applicant for a new NTSC construction permit on Channel 14 at Pittsburg, Kansas ("Davis Pittsburg"); Davis Television Topeka, LLC, applicant for a new NTSC construction permit on Channel 43 at Topeka, Kansas ("Davis Topeka"); Davis Television Fairmont, LLC, applicant for a new NTSC construction permit on Channel 66 at Fairmont, West Virginia; and Davis Television Wausau, LLC, permittee of a new NTSC station on Channel 55 at Wittenberg, Wisconsin (these commonly owned Davis entities collectively referred to herein as "Davis"), by their attorneys and pursuant to Section 1.429(d) of the Commission's Rules, hereby seek reconsideration of the Commission's Report and Order, FCC 00-115, released April 4, 2000

in the above-captioned proceeding ("Report and Order"). In support whereof, the following is shown.[1]

II. THE REPORT AND ORDER CORRECTLY FOUND THAT THE CBPA PHRASE "TRANSMITTING IN ANALOG FORMAT" ENCOMPASSES ANALOG APPLICATIONS; CLASS A STATIONS MUST, HOWEVER, PROTECT *ALL* FULL-POWER ANALOG APPLICATIONS

Davis timely filed comments and reply comments in response to the Commission's Notice of Proposed Rule Making, FCC 00-16, released January 13, 2000 (the "NPRM"), in this proceeding. Davis there argued that all of Davis' pending NTSC applications should be protected from interference by new Class A stations because the phrase "transmitting in analog format" as used in Section 336(f)(7)(A)(i) of the Community Broadcasters Protection Act of 1999 ("CBPA") was merely a shorthand phrase used by Congress to describe the *entire* full-power analog universe -- *i.e.*, all NTSC licensees, permittees, and applicants. In the Report and Order, the Commission agreed with Davis, at least in part, and reversed the tentative conclusion it had advanced in the NPRM that the phrase was to be read to *exclude* all NTSC applications pending as of November 29, 1999, the date the CBPA became law. See Report and Order at ¶¶ 44-48. The Report and Order correctly found that Congress intended "transmitting in analog format" to "refer[] to the nature of the service entitled to protection (*i.e.*, analog) rather than to its operational status on the date of enactment of the CBPA. Therefore, the analog station could be licensed, *one for which an application is currently pending*, or one for which a

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[1] The Report and Order was published in the Federal Register on May 10, 2000 (65 Fed. Reg. 29985), and this Petition is therefore timely filed. See 47 C.F.R. § 1.429(d) (1999).

construction permit has been granted but which is not yet built." Report and Order at ¶ 45 (emphasis added). The Commission then erroneously adopted a suggestion put forward in the initial comments of the Community Broadcasters Association ("CBA"), a trade group representing Class A interests, that "certain" NTSC applicants should be excluded from the protected class.[2] In particular, protected NTSC applicants are defined by the Report and Order to be only "post-auction applications, applications proposed for grant in pending settlements, and any singleton applications cut off from further filing." Report and Order at ¶ 46.

The Report and Order's decision to protect some NTSC applicants and not others from Class A interference is not only vague and confusing, it is contrary to Congressional intent. Under Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984), the Commission's first obligation is to ascertain whether Congress has directly spoken to an issue. Where Congress has done so, that is the end of the inquiry. Here, the Commission properly ascertained that Congress had intended the phrase "transmitting in analog format" to encompass NTSC applicants, but then the Commission engaged in a further interpretive exercise that Chevron does not permit. There is nothing in the CBPA or its legislative history to support the elaborate gloss that the Report and Order puts on the class of NTSC applicants entitled to protection from Class A stations. If Congress intended full-power NTSC applicants to be protected from Class A stations, then *all* NTSC applications fall within that *statutory* protection.[3]

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[2] In its reply comments, CBA disavowed its own proposal, nonetheless adopted by the Commission.

[3] The Commission cites the phrase "predicted Grade B contour" in Section (f)(7)(A)(i) of the CBPA for the proposition that Congress intended to protect

(continued...)

There is no *statutory* basis for discriminating between certain groups of NTSC applicants (*e.g.*, auction winning applicants vs. NTSC freeze waiver applicants).[4] Congress did not grant the Commission discretion to pick and choose among NTSC applicants, and the Commission should accordingly revise this portion of the Report and Order on reconsideration to extend protection to all NTSC applicants. It should be noted that with respect to low power and translator applications, which are also protected from Class A interference under the statute, the Report and Order makes no attempt to draw distinctions among different types of applicants, whether mutually exclusive or not.[5] All such applications are protected, even where application contours ultimately turn out to have been hypothetical.

The confusing and potentially inequitable effects of the Report and Order's exercise in line drawing are perhaps most graphically illustrated by the circumstances of Davis Pittsburg. Davis Pittsburg filed its Channel 14 application on September 20, 1996, more than

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[3](...continued)
only NTSC applications "for which there is a single reasonably ascertainable Grade B contour as of November 29, 1999." Report and Order at ¶ 46. This interpretation reads far too much into the simple fact that the phrase "Grade B contour" is singular. The pertinent sentence in (f)(7)(A)(i) makes clear that a Class A station must protect the Grade B contour of "*any*" analog station. If the phrase "transmitting in analog format" encompasses applications, then *each* application must be protected. Each application, after all, has *its own* "reasonably ascertainable [singular] Grade B contour." The Commission's interpretation that each *group* of applicants must have reduced itself to a "single reasonably ascertainable Grade B contour" effectively reads the word "any" right out of the statute, which is clearly impermissible under Chevron.

[4] Because the final DTV Table of Allotments has been adopted, the "freeze" has served its intended purpose and is obsolete. Davis urges the Commission to recognize this reality and terminate the freeze immediately.

[5] See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

three years before the CBPA was enacted, and therein sought a waiver of the 1997 freeze. In 1997, the Commission adopted the digital Table of Allotments which appeared to preempt NTSC Channel 14 at Pittsburg. Davis Pittsburg therefore sought reconsideration of that decision and in the Commission's decision on reconsideration, Davis Pittsburg was promised a future window within which it could amend its application or seek a substitute allotment for Pittsburg. See Second Memorandum Opinion and Order, 14 FCC Rcd 1348, 1367 (1998). In the meantime, on January 28, 1998, within the 180-day window established by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997),[6] Davis filed a settlement agreement encompassing both applicants for Channel 14 at Pittsburg. On November 22, 1999, one week before enactment of the CBPA, the Commission opened the filing window which had been promised in 1998. See *Public Notice*, DA 99-2605, released November 22, 1999. The closing date for that window was subsequently extended to July 15, 2000. See *Public Notice*, DA 00-536, released March 9, 2000.

Because the Report and Order is somewhat ambiguous on this issue (*i.e.*, treating settlements as a different class of cases because the "identity of the successful applicant is known" while protecting only a single identifiable contour), Davis urges the Commission to remove that ambiguity on reconsideration, particularly given the mandate of Section 309(l)(3) of the Communications Act (the FCC must waive all of its regulations in order to approve settlements filed within the 180-day window established bu the BBA). The Commission should, at a minimum, protect both application contours on file for Pittsburg Channel 14 as of November 22, 1999 (see note 3, supra), and Davis Pittsburg must be given a fair opportunity to amend its

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[6] The BBA obligates the FCC to waive any regulations as necessary to grant applications in such settled cases. See 47 U.S.C. § 309(l)(3).

application in a manner that is consistent with those protected contours to accommodate the DTV Table of Allotments without additionally having to protect new Class A stations. Any delay in application amendment is due to the actions the Commission has taken in creating the DTV allotment table. Any suggestion that Davis Pittsburg is not entitled to protection against Class A stations ignores the considerable equities favoring Davis Pittsburg as well as the mandate of Section 309(l)(3) of the Communications Act to waive all Commission regulations as necessary to grant settlement. As the surviving applicant under a settlement agreement that was timely filed under the BBA, Davis Pittsburg should be given protection against all Class A stations as it amends its application within the window to take the digital Table of Allotments into account.

Although the Davis Pittsburgh scenario outlined above is particularly egregious, the equities in all cases favor pending NTSC applicants vis-a-vis new Class A stations. The conclusion that TV translator and LPTV *applications*, which are not otherwise protected against displacement, should enjoy protection vis-a-vis Class A stations that is not afforded to full-power applicants must be corrected on reconsideration. The Commission's attempt to remove statutory protections afforded the full power analog applicant universe should be reconsidered and modified.[7]

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[7] Grant of the relief herein requested by Davis would clarify another anomaly in the Report and Order. Paragraph 44 of the Report and Order implies that some but not all freeze waiver applications are protected ("[w]e will not require Class A applicants for initial Class A authorization to protect . . . full-service applications that were not accepted for filing by November 29, including most pending television freeze waiver applications"). This ambiguity arguably has relevance to the applications of Davis Topeka and Davis Duluth. Both applicants are currently "singletons" (no competing applicants on file) and are prosecuting an appeal in the Court of Appeals for the District of Columbia Circuit (Case No. 99-1260)

(continued...)

III. THE COMMISSION SHOULD NOT ACCEPT APPLICATIONS FOR CLASS A STATUS UNTIL IT ADOPTS *FINAL* REGULATIONS

In the Report and Order, the Commission recognizes that the CBPA provides that licensees may submit Class A applications "within 30 days after final regulations are adopted" implementing the CBPA. Report and Order at ¶ 9. However, without stating the basis of its interpretation, the Commission construes the phrase "final regulations" to mean the effective date of the Class A rules adopted in the Report and Order. Id. But the Commission's Class A rules will not be final upon the effective date of the Report and Order, as the Commission will not have resolved this Petition or any other petitions for reconsideration of the Report and Order by that date.

The plain language of the CBPA makes clear that Congress drew a clear distinction between "regulations" and "final regulations." Congress, in directing the Commission to establish the Class A rules, stated that within 120 days of the enactment of the CBPA, the Commission "shall prescribe *regulations* to establish a class A television license . . . ." 47 U.S.C. § 336(f)(1)(A) (1999) (emphasis added). The phrase "final regulations" was not used. However, Congress went on to mandate that the Commission allow licensees to submit applications for Class A designation only "within 30 days after *final regulations* are adopted . . .

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[7](...continued)
which, if successful, would result in the grant of the singleton applications pursuant to the BBA and 47 U.S.C. §§ 309(j)(1) and (j)(6)(e) without further applications being solicited. Davis believes that, if its court appeal is successful, the Topeka and Duluth singletons would be eligible for immediate grant under the Report and Order. However, to the extent reconsideration of the Report and Order is needed to accommodate the results of the pending Davis court appeal, it is respectfully requested.

." 47 U.S.C. § 336(f)(1)(C) (1999) (emphasis added). If Congress had meant for the regulations initially prescribed in the Report and Order to be "final regulations" for purposes of the statute, it would have used that term in subsection (f)(1)(A). But against the backdrop of an established administrative practice under which the Commission's regulations are not final until petitions for reconsideration have been processed and acted upon, Congress wisely mandated that Class A applications be delayed until the affected parties have had an opportunity to petition for changes in newly adopted rules. Since the Commission must grant qualified applications within a short, 30-day window following their submission, leaving little time to examine these applications and consider their impact on the television landscape, Congress mandated that the rules pursuant to which Class A applications are filed must be final.

There are compelling reasons for allowing the reconsideration process to run its course before Class A applications are entertained. Applications can properly be submitted to the Commission only after the specifics regarding eligibility, required protections, and classes entitled to protection have been finalized. Applications filed pursuant to the regulations set forth in the Report and Order may be directly affected by changes resulting from the Commission's reconsideration of its rules.[8]

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[8] This issue is particularly relevant in light of Davis' claims set forth above in Section II, above. The CBPA states that the Commission must award Class A licenses within 30 days of receipt of an application, except in limited circumstances, such as those where the LPTV station would interfere with a station transmitting in analog format. 47 U.S.C. § 336(f)(1)(C) (1999). Many Class A applications predicated on the regulations set forth in the Report and Order would be rendered meaningless if the Commission were to alter its definition of "transmitting in analog format" to encompass NTSC applications.

Furthermore, while the Commission could not reasonably have been expected to anticipate or assume that petitions for reconsideration of its Report and Order would be filed, the filing of the instant Petition demonstrates that the Class A rules are not yet final. Nor can the Commission assume that it will not change its regulations upon reconsideration. Any such assumption would undermine the integrity of the reconsideration process and serve as a deterrent to fair consideration of such petitions.

There is no need for the Commission to contravene the CBPA and grant Class A licenses in haste. By acting promptly on all reconsideration petitions, the Commission can finalize its Class A regulations expeditiously while giving fair consideration to the merits of reconsideration petitions. By expediting its decision on reconsideration, the Commission can process Class A applications that are in accord with final regulations rather than regulations that may become obsolete under a revised regulatory scheme.

IV. THE FCC'S INTERPRETATION OF SECTION 336(F)(7)(A) OF THE CBPA VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

As noted above, the Report and Order concludes that LPTV stations entitled to Class A status take priority over certain analog full-power applicants. As the WB Television Network ("WB") made clear in its February 22, 2000 Reply Comments filed in response to the NPRM, however, that preference for LPTV stations, because it is predicated in significant part on the CBPA's finding that the grant of Class A licenses would serve "the public interest to promote

diversity in television programming such as that currently provided by low-power television stations to foreign-language communities,"[9] runs afoul of the First Amendment.

There is no need to repeat the WB's arguments on this issue here. Rather, a copy of the relevant pages from the WB's Reply Comments are attached hereto and, with the permission of WB's counsel, incorporated herein by reference. Davis agrees with the WB that the favoring of one group (Class A stations) over another (full-power NTSC applicants) on the basis of program content (*e.g.*, foreign-language programming) triggers strict scrutiny under relevant United States Supreme Court precedent. See Turner Broadcasting System, Inc. v. FCC, 114 S.Ct. 2445, 2464, 2476-77 (1999). At the same time, there has been no showing in this record, either at the Congressional or agency level, that a preference for Class A stations over NTSC applications serves a compelling governmental interest and is the most narrowly tailored means to accomplish the identified objectives. To the contrary, because the CBPA recognizes the inherent coverage advantages of full-power stations over LPTV stations (Section 5008(b)(2) of Pub L. No. 106-113), and because full-power stations are themselves free to provide foreign language programming, Davis believes that such showings could not have been made here.

In any event, in the absence of these required showings, the Class A regulations fail to pass Constitutional muster and should be revised as set forth in Section II supra to eliminate any favoritism of Class A stations over full-power analog applicants.

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[9] Section 5008(b)(5) of Pub. L. No. 106-113, 113 Stat. 1501 (1999).

V. CONCLUSION

For the reasons set forth above, Davis urges the Commission to reconsider and modify its Class A rules in a manner consistent with this Petition.

Respectfully submitted,

DAVIS TELEVISION DULUTH, LLC
DAVIS TELEVISION CORPUS CHRISTI, LLC
DAVIS TELEVISION PITTSBURG, LLC
DAVIS TELEVISION TOPEKA, LLC
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Their Attorneys

EXCERPT FROM FEBRUARY 22, 2000 REPLY COMMENTS OF THE WB TELEVISION NETWORK

II. The FCC's and the CBA's Proposed Interpretations of Section 336(f)(7)(A) of the Act Would Violate the First Amendment to the U.S. Constitution.

In enacting the CBPA and making a Class A license available to qualifying LPTV stations, Congress made the explicit finding that it would serve "the public interest to promote diversity in television programming such as that currently provided by low-power television stations to foreign-language communities."[9] Thus, Congress awarded primary service status to qualifying LPTV stations based in large part on the nature of the programming that some LPTV stations currently are providing to their respective communities.

It is beyond dispute that television broadcasters engage in and transmit speech, and, therefore, are entitled to the protections of the First Amendment. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2464 (1994) ("*Turner I*") ("[O]ur cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

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[8](...continued)
have been pending before the Commission since July 1996, 32 of them propose to bring a first local television service to the designated community.

[9] Section 5008(b)(5) of Pub. L. No. 106-113, 113 Stat. 1501 (1999). Congress found that approximately two-thirds of all LPTV stations serve rural communities. Congress also found that those LPTV stations serving urban markets typically provide niche programming (*i.e.*, bilingual or non-English programming) to underserved communities in large cities. *See* 145 Cong. Rec. S14724 (November 17, 1999).

The FCC's longstanding rules regarding interference between full-service television stations and LPTV and TV translator stations are content-neutral because they have been applied equally to all stations within the same class, irrespective of the content and/or nature of the stations' programming. However, if the FCC's and/or the CBA's proposed interpretation of Section 336(f)(7)(A) of the Act were to be adopted, the Commission's implementation of the CBPA would effectively give Class A LPTV applications a preference over earlier-filed applications for new full-power television stations. Because this preference for Class A applications would be based in large part on Congress' explicit finding concerning the nature of the programming provided by some LPTV stations, it would constitute a content-based regulation that could not be reconciled with basic First Amendment principles. In essence, the Commission's (and the CBA's) proposed interpretation of Section 336(f)(7)(A) would effectively make bilingual or foreign-language programming -- which apparently is being provided by approximately one-third of all LPTV stations[10] -- a dispositive factor with respect to obtaining a preference for a primary service authorization. The Commission's action therefore would constitute a content-based preference for Class A stations which would be subject to strict scrutiny.

As Justice O'Connor explained in *Turner I* with respect to the 1992 Cable Act:

> [T]he Act distinguishes between commercial television stations and noncommercial educational television stations, giving special benefits to the latter .... Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make references to content. They may not reflect hostility to particular points of view, or desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.

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[10] *See* 145 Cong. Rec. S14724 (November 17, 1999).

Turner I, 114 S. Ct. at 2476-77 (concurring in part and dissenting in part) (citations omitted).

The majority in *Turner I* held that the cable "must-carry" rules are unrelated to content because the scheme does not distinguish between commercial and noncommercial television stations. The Court observed that:

> The rules benefit all full power broadcasters who request carriage -- be they commercial or non-commercial, independent or network-affiliated, *English or Spanish language, religious or secular*. The aggregate effect of the rules is thus to make every full power commercial and non-commercial broadcaster eligible for must-carry, provided only that the broadcaster operates within the same television market as a cable system.

114 S. Ct. at 2460 (emphasis added). The Court's holding in *Turner I* also made clear, however, that any regulatory scheme that draws distinctions between broadcasters on the basis of the content of their programming (*e.g.*, English versus bilingual or foreign-language programming), awarding a preference to one over another, necessarily would be content-based and would be subject to strict scrutiny.

When applying First Amendment principles to the CBPA, it is clear that if the FCC fails to protect pending NTSC applications from subsequently-filed Class A applications, the Commission's interpretation of Section 336(f)(7)(A) of the Act would result in a content-based preference for Class A applications because they would be given a priority over previously-filed applications for new, primary service NTSC stations.[11] As demonstrated above, the First Amendment does more than

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[11] The WB recognizes that the FCC lacks jurisdiction to declare a statute unconstitutional. Nevertheless, it is not improper for the Commission to be influenced by constitutional considerations in interpreting or applying a statute. *See Branch v. FCC*, 824 F.2d 37, 47 (D.C. Cir. 1987), citing *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361 (1974); *Public Utils. Commission v. United States*, 355 U.S. 534 (1958). *Cf. Open Media Corp.*, 8 FCC Rcd 4070, 4071 (1993) (FCC described its "policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as

(continued...)

merely prohibit the government from intentionally suppressing speech that it does not like. It also prohibits the government from giving certain types of speech a preference over others because it thinks the speech is especially valuable.[12] Therefore, the Commission cannot, consistent with the First Amendment, give Class A applications a preference over previously-filed applications for new NTSC stations unless the FCC can establish that the award of such a benefit satisfies strict scrutiny analysis. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (a content-based regulation is unconstitutional unless it is narrowly-tailored to serve a compelling governmental interest).

In this case, Congress made no effort to show that the establishment of a Class A service would serve a compelling governmental interest, or that awarding Class A applications a preference over earlier-filed applications for new NTSC stations is narrowly-tailored to serve a compelling governmental interest. Thus, in order for the Commission's (and the CBA's) proposed interpretation of Section 336(f)(7)(A) to pass constitutional muster, the Commission must find that every Class A station will promote diversity in television programming by airing bilingual or foreign-language programming, and that such programming has greater public interest value than the programming that otherwise would be provided by new full-power NTSC stations.[13] The Commission's inherent

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[11](...continued)
ownership or programming.").

[12] *See Turner I*, 114 S. Ct. at 2477 (O'Connor, J., concurring in part and dissenting in part); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232-32 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981) (plurality); *Carey v. Brown*, 447 U.S. 455, 466-68 (1980).

[13] Congress recognized that LPTV stations are not satisfactory substitutes for full-power stations and have substantially smaller coverage areas. Congress further found that "[l]ow-power television plays a valuable, *albeit modest role* [in the video programming] market . . . ." *See* Cong. Rec. S14724 (November 17, 1999) (emphasis added).

inability to make such a finding demonstrates the constitutional infirmity of its and the CBA's proposed interpretation of Section 336(f)(7)(A) of the Act. The FCC simply cannot single out pending applications for new NTSC stations for disparate treatment when the alleged governmental interest -- promoting diversity in television programming by attempting to preserve the bilingual or foreign-language programming provided by a select few LPTV stations -- is not compelling. Moreover, the means by which the Commission would elect to achieve that governmental interest -- awarding Class A applications a preference over earlier-filed NTSC applications -- is not narrowly-tailored to serve that interest. Indeed, the Commission's proposal fails to recognize that some of the full-service stations proposed in the pending NTSC applications and allotment rulemaking petitions also may contribute to diversity in television programming by airing their own bilingual or foreign-language programming. Therefore, in order to avoid having its implementation of Section 336(f)(7)(A) of the Act run afoul of the First Amendment, the Commission should interpret that statutory provision consistent with its longstanding regulatory scheme and require Class A applications to protect pending NTSC applications.